IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.769 OF 1996
IN
NOTICE OF MOTION NO.2867 OF 1992
IN
SUIT NO.3050 OF 1992

M/s.Fleming Shaw & Co.Pvt.Ltd.
carrying on business at 235,
Piramal Mansion, Dr. Dadabhoy
Naoroji Road, Bombay .. Appellant.

V/s.

1. Commercial Union Assurance
Company of Australia Ltd.,
having their office at 402,
Collins Street, Melbourne,
3001, Australia.

2. M/s.Associated Marine
Assurance Agents Pvt.ltd.,
(Incorporated in Victoria),
469, Collins St. Melbourne,
Australia.

3. M/s.Insimpex Corporation,
carrying on business at
Arcadia, 5th Floor, 195,
Nariman Point, Bombay 21.

4. The Reserve Bank of India,
having its Central Office
at Central Office Building,
Bombay - 400 023.

5. The British India Corpo-
ration Ltd., a Govt of
India Company incorporated
under the Companies Act,
having its registered
office at Southerland
House, 16/8, Civil Lines
Kanpur .. Respondents.

Mr.Chetan Kapadia with Mr.Darshan Mehta i/b. Dhruv Liladhar & Co. for the appellant.

None for the respondents.

CORAM : R.M. LODHA &

J.P. DEVADHAR, JJ.
DATED : 10TH AUGUST, 2005.

ORAL JUDGMENT (Per R.M. Lodha, J.)

Heard Mr.Chetan Kapadia, the learned counsel for the appellant. Nobody appears for the respondents.

2. On June 9, 2004, we passed the following order :

> "The Court Associate informs us that the names of the advocates appearing for the respondents have been shown on board. However, nobody appears for the respondents. In the circumstances, we heard the learned Counsel for the appellant. We also perused the order dated 27th June, 1996 impugned in the present appeal and the material available on record.
>
> 2. The present appeal is at the instance of original defendant No.3 aggrieved by the order dated 27th June, 1996 passed by the learned motion Judge directing the present appellant to deposit a sum of Rs.5,00,000/- either in this Court or in Kanpur Court.
>
> 3. Upon perusal of the impugned order, we find that the said order is unsustainable on its face. The reference to the facts recorded in the impugned order itself shall suffice and it is not necessary to elaborately deal with the facts. In the impugned order it is recorded that the competent court namely Civil Judge, Kanpur is seized of the dispute between the parties. At the instance of the present defendant No.2 who is plaintiff in Kanpur Court, a temporary injunction has been granted against the present appellant not to remit the disputed sum of Rs.7,91,,214.38 ps. out of India. The learned motion Judge observed in the impugned order that since there is already a preventive order against the present appellant from transferring the amount of Rs.7,91,214.38 ps. to Australia,

> no prejudice would be caused if the present appellant is directed to deposit in this court or in Kanpur Court and consequently the learned motion Judge directed the present appellant to deposit a sum of Rs.5,00,000/- in the interest of justice either before this Court or before Kanpur Court. When the Kanpur Court which is the competent Court is seized of the matter and the said Court while restraining the present appellant from remitting the amount of Rs.7,91,214.38 ps. did not direct the present appellant to deposit the said amount or any part thereof in the Court, we hardly find justification in the order of the learned motion Judge, directing present appellant to deposit the sum of Rs.5,00,000/- before this court or before Kanpur Court.
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> 4. At this stage Ms.Indu Prashant, advocate appears for respondent Nos.1 to 3 (original plaintiffs) and submits that on behalf of the said respondents Mr.K.K.V. Kurup is to argue the matter but because of his ill-health, he is not in position to attend the Court. If such prayer was made at the time the case was called out, we would not have heard the Counsel for the appellant and considered the matter. However, for the stated reason, we adjourn the hearing of the appeal.
>
> 5. S.O. two weeks."

2. In our order dated June 9, 2004 we had already indicated that there was no justification in the order of the learned motion Judge directing the present appellant to deposit a sum of Rs.5,00,000/- before this Court or before the Kanpur Court. However, the matter came to be adjourned as the learned counsel appearing on behalf of respondent Nos.1 to 3 submitted that Mr.K.K.V. Kurup who was to argue the matter on behalf of the respondents was unable to attend the Court due to his ill-health.

3. Thereafter, the matter came up before us on June 24, 2004 but was adjourned by the following order :

> "Ms.Indu Prashant, learned counsel for the respondent No.1 submits that Mr.K.K.V. Kurup, Advocate for the said respondents who is to argue the matter has not yet resumed the work because of his ill health. She prays for time. Learned counsel for the appellants has no objection.
>
> 2. S.O. two weeks."

4. Then the matter came up before us on July 14, 2004 and was adjourned by the following order :

> "Mr.K.K.V. Kurup, the learned counsel for the respondent Nos.1 to 3 submits that he is not feeling well even today and he prays for some time.
>
> 2. Mr.Chetan Kapadia, the learned counsel for the appellant has no objection.
>
> 3. S.O. one week."

5. Then the matter came up before us on August 18, 2004 but was adjourned. The appeal then came up before us on June 25, 2005 and we adjourned the appeal to July 27, 2005 by the following order :

> "Mr.Chetan Kapadia, advocate appears for the appellant. Nobody appears for the respondent Nos.1,2 and 3.
>
> 2. We adjourn the hearing of the appeal to 27.7.2005 and direct the advocate for the appellant to inform the advocate for the respondent Nos.1,2 and 3 that hearing of the appeal has been fixed for 27.7.2005 and if nobody appears on behalf of the respondent

Nos.1,2 and 3 on that date, the court may proceed with the hearing of the appeal exparte.

3. Stand over 27.7.2005."

6. On July 29, 2005 when the appeal came up before us none appeared for the respondents but we adjourned the appeal for August 8, 2005.

7. The learned counsel for the appellant submits that the advocate for the respondents has been informed of the hearing of the appeal.

8. For want of appearance of respondent Nos.1 to 3, the appeal deserves to be proceeded exparte and we proceed accordingly.

9. We have already indicated the reasons in our order dated June 9, 2004 that justify the setting aside of the order dated June 27, 1996 passed by the learned motion Judge.

10. For the reasons that we have already indicated in our order dated June 9, 2004, the appeal deserves to be allowed. We, accordingly, allow the appeal and set aside the order dated June 27, 1996. Since the respondents have not chosen to appear, no costs.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)